The 'Euroexpress'

The Owners Of Cargo Lately Laden On Board The 'Euroexpress' v The 'Euroexpress' (Owners of) (Banque Indosuez & Anor, Interveners)

COURT OF APPEAL (SINGAPORE) – CIVIL APPEAL NO 16 OF 1987
WEE CHONG JIN CJ, CHUA J AND CHAN SEK KEONG JC
29 SEPTEMBER 1988

Shipping – Arrest of ship or vessel – Whether effected in bad faith – Sale of vessel – Application of proceeds – Sheriff's expenses – Funds in court – Priority – Claimant granted leave to discharge cargo – Loss of anchor while vessel being operated or managed by claimant during discharge of cargo – Whether retrieval and reinstallation of anchor was undertaken at instance of sheriff – Whether costs and expenses thereof form part of sheriff's expenses

The appellants issued a writ in rem against a vessel for the purpose of a claim for damages against the owners of the vessel. The appellants applied for the issue of a warrant for the arrest of the vessel. The warrant was executed by the sheriff following an undertaking given by the appellants' solicitors to indemnify and to provide the sheriff with sufficient funds as and when required by the sheriff to meet the charges and expenses that may be incurred in consequence of the arrest. The appellants obtained an order granting them leave to discharge their cargo from the vessel by which order they were also required to effect insurance cover in respect of the discharge of the cargo. Later, the appellants obtained an order for the appraisement and sale of the vessel by the sheriff. A commission of appraisement and sale of the vessel was duly issued and, following an undertaking to pay on demand all the sheriff's fees and expenses, the commission was executed. Pursuant to the order granting leave to discharge the appellants' cargo, the appellants' agent took command of the vessel for its journey from the eastern working anchorage to the western working anchorage, where the discharge of the cargo took place. On the return journey, the vessel's port anchor together with the entire length of the anchor chain fell into the sea.

The sheriff declined to treat the appellants' solicitors' request to treat the recovery of the loss of the anchor as part of the sheriff's expenses. At the request of the appellants' insurer, a salvage company recovered the anchor and chain from the seabed. It was not in dispute that although the sheriff was aware of the loss of the anchor and the appellants' efforts to recover it, the sheriff never authorized its retrieval. The vessel was sold and the proceeds of sale were paid into court. The mortgagees of the vessel had also obtained judgment against the owners.

The appellants applied by way of motion for the following orders: (a) that the sheriff's cost and expenses amounting to $134,943.70 be forthwith paid out of the funds lying in court representing the proceeds of sale of the vessel and the bunkers to the appellants or their solicitors; (b) that the sum of $11,500, being the cost of retrieving and reinstalling the port anchor of the vessel, formed part of the sheriff's expenses and be forthwith paid out of the funds in court to the plaintiffs or their solicitors; and (c) that the costs of and incidental to the motion be taxed and paid out of the proceeds of sale to the plaintiffs in priority to all other claims except the sheriff's expenses.

The trial judge dismissed the application, deciding that he was not satisfied at that threshold stage that the plaintiffs will ultimately be entitled to payment out of the sheriff's expenses as part of their costs of arrest within the principle in *The Reina (No 2)*[1] and also deciding that the retrieval of the anchor and chain was not carried out at the instance of the sheriff. The appellants appealed to the Court of Appeal. The respondents, inter alia, suggested that the appellants might have acted in bad faith in arresting the vessel. The suggestion was made on the basis that the bills of lading on which the appellants' claim was based were allegedly fraudulent as they were either issued or negotiated long before the cargo was loaded on board the vessel. However, no suggestion was made that the appellants as cargo owners were privy to the alleged fraud.

Held, allowing the appeal in part:

(1) In relation to payment out of claims, the court is naturally concerned that unless the parties consent or priorities are such that it is clear that the claimants are ultimately entitled to at least the amount ordered, payment out to persons who are not judgment holders may lead to fraud on the other creditors who are not present before the court. It has been the long and consistent practice of the Admiralty Court to indemnify the claimants responsible for producing the fund in respect of the expenses incurred. This rule of practice is founded on a readily understandable equity – the producer of the fund facilitates the functions of the court and protects the interests of other claimants. The costs indemnified and accorded priority are those directly incurred by a claimant in effecting the arrest of the vessel and in the subsequent proceedings up to and including the date of an order for appraisement and sale.

(2) The suggestion that the two bills of lading were fraudulent, standing by itself – even if true – can in no way imply any bad faith on the part of the appellants in arresting the vessel. It may well be that ultimately the appellants' claim may fail but that is not the test of whether they had acted in bad faith. Claimants are entitled to arrest a vessel or other such property as is permitted to obtain security for the claim. It cannot be argued that the arrest was made in bad faith merely because there is a good defence to the claim. For an arrest to be in bad faith, there must be some element in the arrester's conduct, for example, where the arrest is in relation to a malicious claim or is of itself malicious, *apart from* the proper enforcement of his claim.

(3) In regard to the appellants' application for payment out of the sheriff's expenses, the discretion of the trial judge had been exercised on wrong principles and this provided sufficient justification for setting aside the order made in the exercise of that discretion, namely, the order regarding the first prayer of the motion.

(4) In regard to the appellants' claim for the costs of retrieval and reinstallation of the port anchor as sheriff's expenses, it was no justification for the claim that the recovery was done in consultation with or with the knowledge of the sheriff and was for the benefit of all because it increased the security of the vessel. It is an incontrovertible rule of practice that before an item of expenditure may be cast as sheriff's expenses and so rank as first charge on the proceeds in the hands of the court, it must not only arise from the preservation and good management of the vessel but must also receive the sanction of the court or the sheriff. In the present case, there can be no doubt that the recovery of the anchor – even assuming that it was done to enhance the value of the vessel – was clearly not carried out at the instance of the sheriff. In the second place, the loss .of the anchor occurred while the appellants were operating or managing the vessel in the discharge of their cargo. Its recovery must be the obligation of the appellants who must bear the costs of recovery.

Cases referred to
1 *The Reina (No 2)* [1963] 2 Lloyd's Rep 513 (folld)
2 *The World Star* [1987] 1 Lloyd's Rep 452 (folld)
3 *The Falcon* [1981] 1 Lloyd's Rep 13 (refd)
4 *The Rene* [1955] 1 Lloyd's Rep 101 (folld)
5 *The Eastern Lotus* [1980] 1 MLJ 137 (folld)

Legislation referred to
Rules of the Supreme Court 1970 O 70 r 10

Appeal from: Admiralty in Rem No 671 of 1985 (High Court, Singapore)

Loh Boon Huat for the appellants.
G Selvam for the respondents.
Danny Chua for the interveners.

Cur Adv Vult

Wee Chong Jin CJ (delivering the judgment of the court): On 24 October 1985, the appellants issued a writ in rem against the vessel 'Euroexpress' ('the vessel') for the purpose of claiming against the respondents, the owners of the vessel, damages for breach of contract and/or breach of duty and/or for negligence in or about the carriage of the appellants' cargo on board the vessel from La Spezia, Italy to Tianjin Port, China under bills of lading nos 1 & 2 dated 30 April 1985.

On 24 October 1985, the appellants' solicitors applied for an issue of a warrant for the arrest of the vessel. On 25 October 1985, the warrant was executed by the sheriff. Before the warrant was executed, the appellants' solicitors, in accordance with the usual practice and in compliance with O 70 r 10, had lodged with the sheriff's office an undertaking to indemnify and to provide the sheriff with sufficient funds as and when required by the sheriff to meet the charges and expenses that may be incurred in consequence of the arrest.

On 20 January 1986, the appellants applied for, and on 10 March 1986 obtained, leave to discharge the cargo of steel billets and an order for the appraisement and sale of the vessel. By the same order of court dated 10 March 1986, the appellants were, inter alia, required to 'effect insurance cover to be agreed between the parties in respect of the said discharge of the (appellants') cargo from the vessel'.

On 31 March 1986, the mortgagees, Banque Indosuez and Deutsche Schiffsbeleihungs-Bank Aktien Gesellschaft ('mortgagees') entered caveats against the release of the vessel and payment out of the proceeds of sale. On 2 April 1986, they issued an action in rem no 174 of 1986 against the owners of the vessel and, on the same day, were granted leave to intervene in the present action.

On 4 April 1986, the appellants obtained an order for the appraisement and sale of the vessel by the sheriff. A commission of appraisement and sale of the vessel was duly issued. On 17 April 1986, before it was executed, an undertaking was lodged with the sheriff's office to pay on demand all sheriff's fees and expenses.

On 12 April 1986, pursuant to the order of court dated 10 March 1986 granting leave to discharge the cargo, the appellants' agent took command of the vessel for the voyage from the eastern working anchorage to the western working anchorage where the discharge of the appellants' cargo was to take place. Upon the discharge of the cargo, when the vessel began her journey back to the eastern working anchorage on or about 18 April 1986, her port anchor together with the entire length of the anchor chain fell into the sea.

On 19 April 1986, the appellants' solicitors notified the sheriff of the loss of the anchor, seeking confirmation that:

> in the event the salvage operation is arranged by China Insurance Co Ltd, all expenses would rank as sheriff's expenses.

On 21 April 1986, the sheriff replied:

> As 'Euroexpress' was insured at the time of the mishap on 18 April 1986, should not be expenses incurred to recover the lost anchor be paid by China Insurance Co Ltd.

On 22 April 1986, the appellants' solicitors made another request for the sheriff to treat the cost of recovery of the anchor as part of the sheriff's expenses as follows:

> We understand from our clients that the dropping of the port anchor and its anchor chain was not due to any negligence on the part of our clients' agents or servants. We believe that our clients have been advised by their surveyors that the dropping of the anchor chain and the port anchor was due to wear and tear of the said anchor's chain. Such loss is therefore not covered by the policy of insurance. It is for that reason that our clients have instructed us to write to you for your agreement to treat the cost of recovering the anchor and its chain and its installation back as part of your expenses.

The sheriff, however, did not reply to this letter until a third request by the appellants' solicitors was made on 9 July 1986, to which the sheriff replied on 12 July 1986, declining the appellants' solicitors' request to treat the recovery of the loss of the anchor as part of the sheriff's expenses.

In the meantime, on 24 April 1986, at the request of the appellants' insurer, a salvage company, Sembawang Salvage Pte Ltd, was assigned the task of recovering the lost anchor and chain from the seabed. The anchor and chain were lifted out of the seabed by crane barge and stowed on deck.

As mentioned earlier, on 9 July 1986, the appellants' solicitors made a third request to the sheriff for the costs of retrieving the anchor to form part of the sheriff's expenses, as follows:

Dear Sirs

'Euroexpress'

We refer to the above matter and to our letters of 18 and 22 April 1986 and to your letter of 21 April 1986.

As you are aware the port anchor together with the cable chain which fell into the sea was successfully retrieved and placed in position by Semco on or about 24 April 1986.

We understand from our clients that the dropping of the port anchor and its anchor chain was not due to any negligence on the part of our clients' agents or servants.

According to the surveyors report, a copy of which is enclosed for your reference, the loss of the port anchor and cable was reasonably attributable to a badly worn brake line which appeared to have lost all braking effects as a result of months of inaction.

The cost of the salvage operation of the said port anchor and cable amounting to S$11,500 had been settled by our clients' agents to Semco.

In the premises our clients have instructed us to write to you to reconsider your decision and for your agreement to treat the cost of recovering the anchor and its chain and its reinstallation as part of your expenses.

On 12 July 1986, the sheriff replied that they could not agree to the request to treat the costs of retrieval of the anchor as sheriff's expenses 'as the solicitors for the interveners, M/s Prakash Gurbani & Chong, have indicated they would be disputing this matter'.

At this juncture, it is to be observed – and this is not in dispute – that the terms of the correspondence between the appellants' solicitors and the sheriff clearly show that although the sheriff was undoubtedly aware of the loss of the anchor and the appellants' efforts to recover it, the sheriff never authorized the retrieval and, indeed, by their final letter dated 12 July 1986, declined the request to treat the costs of retrieval as sheriff's expenses.

In the meantime, on 26 April 1986, the vessel collided with three vessels, namely, 'Hua Tai', 'Inzhenier Yam Burenko' and 'Haewoo No 3'. All three vessels entered caveats against the release of the vessel and payment out. The three collision claimants also commenced action, and of these, two had been discontinued.

On 28 May 1986, the vessel was sold for a total sum of $2,104,310 ($1,983,600 for the vessel and $120,710 for the bunkers). The proceeds of sale were paid into court.

On 27 June 1986, the mortgagees obtained judgment against the respondents for the sum of US$1,128,514 plus interest in admiralty in rem no 174 of 1986.

It is apparent from these figures that any creditor whose claim ranks after the mortgagees' claim will not be able to recover any part of his claim.

On 30 July 1986, the appellants applied by way of motion for the following orders:

(1) That the sheriff's costs and expenses amounting to S$134,943.70 be forthwith paid out of the funds lying in court representing the proceeds of sale of the vessel 'Euroexpress' and the bunkers to the plaintiffs or their solicitors M/s Godwin & Co.

(2) That the sum of S$11,500 being the cost of retrieving and reinstalling the port anchor of the vessel 'Euroexpress' on or about 18 May 1986 (sic) form part of the sheriff's expenses and be forthwith paid out of the funds in court to the plaintiffs or their solicitors M/s Godwin & Co.

(3) That the costs of and incidental to this motion be taxed and paid out of the proceeds of sales to the plaintiffs in priority to all other claims except the sheriff's expenses.

On 13 February 1987, Lai J, after hearing arguments from the appellants, the mortgagees and the respondents, dismissed the motion. In a brief extempore judgment, the learned judge held as follows:

> I am not satisfied at this threshold stage that the plaintiffs will ultimately be entitled to payment out of the sheriff's expenses as part of their costs of arrest within the principle in *The Reina (No 2)* [1963] 2 Lloyd's Rep 513. The retrieval of the port anchor chain was not carried out at the instance of the sheriff. The plaintiffs' application is dismissed with costs to the defendants and interveners/mortagees.

The appellants now appeal against the whole of that judgment. It is convenient to consider, separately, the two prayers in the appellants' motion, namely: (1) that the sheriff's costs and expenses amounting to S$134,943.70 be paid out of the proceeds of sale to the appellants or their solicitors; and (2) that the sum of S$11,500 being costs of retrieving and reinstalling the port anchor form part of the sheriff's expenses to be paid out of the proceeds of the sale.

Payment out from proceeds of sale of sheriff's expenses

The sheriff's fees and expenses incurred in connection with the arrest and sale of the vessel are set out in the sheriff's letter to the appellants' solicitors dated 20 June 1986. These are as follows:

(a)	Guard charges	$ 27,364.00
(b)	Advertisement fee	900.00
(c)	Attendance fee/disbursement	430.00
(d)	Appraisement fee	1,788.00
(e)	Delivery fee	60.00
(f)	PSA dues	47,700.00
(g)	Notarial fee	144.00
(h)	Sheriff's commission	52,632.75
(i)	Maintenance of vessel	3,924.70
		$134,943.70

In opposing the appellants' motion with regard to the first prayer, both counsel for the mortgagees and the respondents relied strongly on a passage in the *Supreme Court Practice* (1988) Vol 1, para 75/24/2, which is as follows:

> Payment out from proceeds of sale – The court has no jurisdiction to order payment out from the proceeds of a sale by order of the court, to persons other than judgment holders or, in the case of the residue after all claims have been satisfied, the defendant (*The Saxon King* 1975 Fo 253). Exceptionally, payment out may be ordered to any person where the defendants and all other parties interested in the proceeds of the sale (judgment holders, interveners and caveators) consent (*The Valiant* 1977 Fo 446). A payment out on account may be ordered where all parties consent, or where the priorities are such that it is clear the claimant will ultimately be entitled to at least the amount ordered: see *The Reina (No 2)* [1963] 2 Lloyd's Rep 513.

It was submitted that, save for the two exceptions mentioned therein, which are not applicable to the present case, the appellants are not entitled to recover their expenditure until after they have obtained judgment.

In our opinion, the passage quoted above has no relevance to the present case. It is concerned entirely with payment out of *claims*, as opposed to payment out of the arrester's expenses paid to the sheriff, which, under the established 'rules of ranking', are (subject to sheriff's expenses) prior charges on any fund in court representing the *res*. In relation to payment out of claims, the court is naturally concerned that unless the parties consent or priorities are such that it is clear that the claimants are ultimately entitled to at least the amount ordered, payment out to persons who are not judgment holders may lead to fraud on the other creditors, who are not present before the court. In other words, the court should be astute to see that its orders will not be used to defraud other creditors, who might have prior claims to the fund. In our view, although the two unreported cases mentioned in the note above were not referred to in argument before us, this is apparent from *The Reina (No 2)*.[1] In *The Reina (No 2)*,[1] the plaintiff mortgagees had obtained judgment against the defendant shipowners for £59,424 and there was fund in court of £68,835 following the sale of the vessel. The plaintiffs moved the court for payment out of court for which no objection was taken. Hewson J ordered that the plaintiff should receive £50,000 on account of their claims as mortgagees (and not in any way connected with their claim for disbursements) because 'there are no caveats against payment out' and 'having in mind that the only probable prior claims for these mortgagees will amount to something under £15,000' (at p 514). Thus, Hewson J was clearly mindful that his order for payment out of the mortgagees' claim should not defeat the prior claims of other creditors.

In our view, all these considerations do not apply to an arrester's expenses in the creation of the fund, which, subject to sheriff's expenses, rank in priority to all other claims. It has been the long and consistent practice of the admiralty court to indemnify the claimants responsible for producing the fund in respect of the expenses incurred. This rule of practice is founded on a readily understandable equity – the producer of the fund facilitates the functions of the court and protects the interests of other claimants. The costs indemnified and accorded priority are those directly incurred by a claimant in effecting the arrest of the vessel and in the subsequent proceedings up to and including the date of an order for appraisement and sale: see *The Reina (No 2)*[1] per Hewson J (at p 514). In our opinion, these principles are expressed in *The World Star*[2] (which report, however, was not available for the learned judge's consideration at the hearing of the motion).

In *The World Star*,[2] the facts, which are almost on all fours with the present case, are these. The World Star was arrested by the plaintiffs for the purpose of making a claim against the owners for breach of a charterparty involving a sister ship. The matter in dispute was referred to arbitration, but the vessel was retained as security for the satisfaction of any award therein. Subsequently, the vessel was appraised and sold pendente lite by the admiralty marshall. The mortgagees sought judgment for the outstanding loan and the plaintiffs sought an order for payment out of all sums incurred in arresting and preserving the vessel. Sheen J held that the plaintiffs were entitled to be paid out of the fund in court in respect of the out-of-pocket expenses of the admiralty marshall in connection with the arrest and preservation of the vessel, even though the plaintiff had not obtained a judgment in the action. After quoting from *The Falcon*,[3] he said (at p 454):

> ... The plaintiffs are entitled to recover that sum (sum paid to the admiralty marshall) in priority to all other claims against the fund, other than the claim of the admiralty marshall.
>
> It is not suggested that the plaintiffs acted in bad faith in arresting World Star. By arresting World Star the plaintiffs have preserved a fund which, subject to priority of payment, is now available to all those who have a claim in respect of which they are entitled to proceed in rem against the owners of that ship. As I have already said, there is a number of such claimants.
>
> The Bank of Seoul has issued a writ in respect of money due to them from the defendants, which debt is secured by a mortgage on World Star. That bank has adopted the arrest and cannot now contend that the ship should not have been arrested. There cannot be any injustice to any claimant upon the fund in court resulting from a payment out to the plaintiffs of the sum of £47,100 in respect of the out of pocket expenses of the admiralty marshall in connection with the arrest and preservation of the ship. Whichever claimant arrested the ship would have had to make those payments.

On the other hand, a grave injustice would be done to the plaintiffs if they were held out of this money until they have obtained a judgment in their action. Accordingly, I order that this sum be paid out to the plaintiffs forthwith.

Counsel for the respondents sought to distinguish *The World Star*[2] from the present case on the ground that in *The World Star*[2] the defendant shipowners abandoned the vessel and did not contest the application for payment out. In our view, this distinction is wholly without merit. In the first place, the reasoning of Sheen J did not depend on any such distinction. The judgment proceeded on the broad equitable principle that the plaintiffs, by arresting and preserving the vessel, were the 'fund producers' and the mortgagee bank had, by issuing the warrant, 'adopted' that arrest. In the second place, contrary to the submission of counsel, it is apparent from the facts outlined by Sheen J (at p 453) that the defendant moved the court for an order that the matters in dispute be referred to arbitration.

In argument before us, as before the learned judge, a suggestion was advanced by counsel that the appellants might have acted in 'bad faith' in arresting the vessel. The basis of the suggestion was that the two bills of lading, on which the appellants' claim was based, were allegedly fraudulent as they were either issued or negotiated long before the cargo was loaded on board the vessel. No suggestion was, however, made that the appellants, as cargo-owners, were privy to the alleged fraud and on this premise, we are of the view that the suggestion, standing by itself – even if true – can in no way imply any 'bad faith' on the part of the appellants in arresting the vessel. It may well be that ultimately the appellants' claim may fail but that is not the test of whether they had acted in 'bad faith'. Claimants are entitled to arrest a vessel or other such property as is permitted to obtain security for the claim. It cannot be argued that the arrest is made in 'bad faith' merely because there is good defence to the claim. In our opinion, for an arrest to be in 'bad faith', there must be some element in the arrester's conduct, for example, where the arrest is in relation to a malicious claim, or is of itself malicious, *apart from* the proper enforcement of his claim. In our judgment, no such suggestion had or could have been advanced.

In our view, therefore, the appellants' application for payment out of the sheriff's expenses falls within the principle stated in *The World Star*,[2] which is indistinguishable from the present case. Counsel for the interveners urged that this court should not interfere with what was essentially an exercise of judicial discretion by the learned judge. But the discretion of the judge has been exercised on wrong principles and this provides, in our view, sufficient justification for setting aside the order made by him in the exercise of that discretion.

Costs of retrieval and reinstallation of the port anchor as sheriff's expenses

In seeking to claim this item of expenditure as sheriff's expenses, counsel for the appellants very properly conceded that in the present case, neither the sheriff nor the court has at any stage authorized the recovery of the lost anchor and anchor chain. Counsel, however, sought to justify his application essentially on the ground that the recovery, which was done 'in consultation with' or 'with the knowledge' of the sheriff, was for the benefit of all because it increased the security of the vessel. It was contended that for this reason, the appellants were entitled to include the cost of recovery as part of sheriff's expenses. We cannot accept that submission. In the first place, it is an incontrovertible rule of practice that before an item of expenditure may be cast as sheriff's expenses, and so rank as first charge on the proceeds in the hands of the court, it must not only arise from the preservation and good management of the vessel but must also receive the sanction of the court or the sheriff: see *The Rene*[4] and *The Eastern Lotus*.[5] In the present case, there can be no doubt that the recovery of the anchor – even assuming that it was done to enhance the value of the vessel – was clearly not carried out at the instance of the sheriff. In the second place, the loss of the anchor occurred while the appellants were operating or managing the vessel in the discharge of their cargo. Its recovery must be the obligation of the appellants who must bear the costs of recovery.

In our judgment, therefore, the learned judge was entirely correct in refusing the appellants' application to treat this item of expenditure as part of the sheriff's expenses.

In the result, the appeal succeeds in part. Accordingly, we set aside the learned judge's order with regard to prayer 1 of the motion and grant an order in terms of prayer 1 with interest at 8% pa from 30 July 1986 (ie the date of the motion) to date of payment, on the sums which they have paid to the sheriff amounting to $34,788. The appeal with regard to prayer 2 of the motion is dismissed. In all the circumstances, we consider that there should be no order for any costs both before the judge and in this appeal.

Order accordingly.

Solicitors: *Godwin & Co*; *Drew & Napier*; *Prakash Gurbani & Chong*.

Reported by *PS Ranjan*